SUBJECT INDEX OF MATTER IN THIS BRIEF

PAGE

Official reports of opinions delivered in Courts below 1

Jurisdiction 1

Statutes involved 2

Statement of matter involved 3

Case allegedly stated by the Complaint as amended 3

First alleged claim 4

Second alleged claim 5

Third alleged claim 6

Respondents contentions in the Courts below 7

Scope of review sought by Petitioner and the reasons assigned for allowance of the Writ 8

Argument 10

I.

The decision of the Court of Appeals is not in conflict with the applicable decisions of this Court 10

(1) The decision below is in strict conformity with the decision of this Court in Federal Baseball Club v. National League (1922), 259 U. S. 200 (referred to in brief as Federal Club case) 10

(2) United States v. Southeastern Underwriters Ass'n (1944), 322 U. S. 533, did not, as petitioner contends, overrule any principle underlying the decision in the Federal Club case 16

(3) The decision of the court below does not conflict with the "recent decisions" cited by petitioner 17

PAGE

(4) The fact that descriptions of some baseball games are now also transmitted by radio broadcast and telecast instead of only by telegraph does not render the Federal Club case inapplicable to the case at bar 19

The alleged restrictions on the right to broadcast and telecast descriptions of games are irrelevant to this case and to the applicability of the Federal Club case 19

The advent of radio and television has not affected the basic character of the game of baseball as defined in the Federal Club case 20

The decision of the Second Circuit Court of Appeals in Gardella v. Chandler (1949), 172 F. 2d 402 discussed 22

II.

The decision of the Court of Appeals below is not in conflict with the decision of Gardella v. Chandler (2d Cir., 1949), 172 F. 2d 402, either within the meaning of, of within the principle underlying, the rules of this Court with respect to granting certiorari 27

III.

Petitioner's contention that the decision of the Court of Appeals is in conflict with an alleged belief of the Congress of the United States is without basis in fact or law and in any event is not a ground for granting certiorari 29

(1) A report of a congressional subcommittee is not an expression of belief or an act of Congress 29

(2) The subcommittee's views quoted by petitioner are not in conflict with the Federal Club case 29

The Congress has enacted no legislation concerning baseball since the Federal Club decision 30

The overruling of the Federal Club case decision would operate retroactively and inequitably 30

PAGE

IV.

Contrary to petitioner's assertion, this case presents no question of public importance which has not been, but should be, settled by this Court 31

V.

The complaint does not state a claim under the anti-trust statutes, even if it were held or assumed that the defendants are engaged in interstate commerce 32

(1) The player regulations, the only restraints which allegedly injure the petitioner, do not restrain commercial competition 32

Agreements between employers as to the terms and conditions of employment of employees are not contrary to the common law or to the Federal Anti-trust Laws 32

The courts have consistently recognized the distinction between competition for labor and commercial competition 32

(2) The player regulations do not directly or at all affect interstate commerce 35

(3) The player regulations do not cause any injury to the public 36

(4) The complaint alleges a labor dispute which is specifically exempted from the Anti-trust Laws by provisions of the Clayton and Norris-LaGuardia Acts 37

Conclusion 40

TABLE OF AUTHORITIES CITED

Cases	Page
Abouaf v. J. D. & A. B. Spreckels Co., 26 Fed. Supp. 830	36
American Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies' Garment Mfrs. Ass'n, 143 Misc. Rep. 319, 255 N. Y. Supp. 614	34
Anderson v. United States, 171 U. S. 604	25
Androff v. Building Trades Employers' Ass'n, 83 Ind. App. 294, 148 N. E. 203	34
Apex Hosiery Co. v. Leader, 310 U. S. 469	32, 33, 34, 35, 36, 38, 39
Appalachian Coals, Inc. v. United States, 288 U. S. 344	36
Associated Hat Mfrs. v. Baird-Unteidt Co., 88 Conn. 332, 91 Atl. 373	34
Associated Press v. N. L. R. B., 301 U. S. 103	18
Associated Press v. United States, 326 U. S. 1	18
Atkins v. W. & A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074	34
Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13	35
Board of Trade v. United States, 246 U. S. 231	24, 36
Citizen Publishing Co. v. Merchants & Mfr. Ass'n, 83 Fed. Supp. 994	36
City Trust, etc., Co. v. Waldhauer, 47 Misc. Rep. 7, 95 N. Y. Supp. 222	34
Conference of Studio Unions, etc. v. Loew's, Inc., 193 F. 2d 51; cert. den., 342 U. S. 919	33
Feddersen Motors v. Ward, 180 F. 2d 519	36
Federal Baseball Club v. National League, 259 U. S. 200	7, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21 22, 23, 24, 25, 26, 27, 28, 29, 30, 31
Fisher's Blend Station v. Tax Commission, 297 U. S. 650	21
Forstmann & Huffman Co. v. United Front C. of T. Workers, 99 N. J. Eq. 230, 133 Atl. 202	34
Gardella v. Chandler, 172 F. 2d 402	8, 22, 23, 24, 26, 27, 28

PAGE

Glenn Coal Co. v. Dickinson Fuel Co., 72 F. 2d 885 36
Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220, 159 Fed. 500 34
Helvering v. Griffiths, 318 U. S. 371 30
Hooper v. California, 155 U. S. 648 ..... 16, 17
Hopkins v. United States, 171 U. S. 578 25
Hunt v. Riverside Club, 140 Mich. 538, 104 N. W. 40 34
Kowalski v. Chandler, et al., 1953 CCH Trade Cases, par. 67,447 21
Levering & Garrigus Co. v. Morrin, 289 U. S. 103 ..... 33, 36
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 ..... 20, 36
Martin v. National League Baseball Club, 174 F. 2d 917 26
Myers v. Shell Oil Co., 96 Fed. Supp. 670 36
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 ..... 18, 29
National League v. Federal Baseball Club, 269 Fed. 681 10
North American Co. v. SEC, 327 U. S. 686 17
Paul v. Virginia, 8 Wall. 168 16
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 21
Schatte v. International Alliance, et al., 182 F. 2d 158; cert. den., 340 U. S. 827 33
Shotkin v. General Electric Co., 171 F. 2d 236 ..... 36, 37
Standard Oil Co. v. United States, 221 U. S. 1 35
State v. Employers of Labor, 102 Neb. 768, 169 N. W. 717 34
Trade Press Pub. Co. v. Moore, 180 Wis. 449, 193 N. W. 507 34
United Brick & Clay Workers of America v. Robinson Clay Products Co., 64 Fed. Supp. 872 ..... 33, 40
United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457 36

PAGE

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 36
United States v. Gold, 115 F. 2d 263 ..... 33, 34
United States v. Hutcheson, 312 U. S. 219 40
United States v. San Francisco Electrical Contractors Ass'n, 57 Fed. Supp. 57 40
United States v. Southeastern Underwriters Ass'n, 322 U. S. 533 ..... 16, 17
United States v. Title Insurance & Trust Co., 265 U. S. 472 30
Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17 30
Wickard v. Filburn, 317 U. S. 111 29
Williams v. Quill, 277 N. Y. 1, 12 N. E. 2d 547 34

RULES

Rules of the United States Supreme Court, Rule 38, Subsec. 5 28
Rules of the United States Supreme Court, Rule 38, Subsec. 5(b) 27, 31

STATUTES

Clayton Act, Sec. 4 2
Clayton Act, Sec. 6 ..... 2, 38
Clayton Act, Sec. 20 ..... 2, 38, 39, 40
Norris-LaGuardia Act, Sec. 13(a) 2, 39
Norris-LaGuardia Act, Sec. 13(c) 2, 39
Senate Report No. 163, 72d Cong., 1st Sess. 19 (1932) 39
Sherman Act, Sec. 1 ..... 2, 4, 5, 6, 10, 11
Sherman Act, Sec. 2 ..... 2, 6, 10, 11
United States Code, Title 15, Sec. 1 4
United States Code, Title 15, Sec. 17 ..... 2, 38
United States Code, Title 28, Sec. 1254(1) 1
United States Code, Title 28, Sec. 2101(c) 1
United States Code, Title 29, Sec. 52 ..... 2, 37, 38
United States Code, Title 29, Secs. 101-115 37
United States Code, Title 29, Sec. 113(a) 2, 39
United States Code, Title 29, Sec. 113(c) 2, 39

IN THE

Supreme Court of the United States

October Term, 1952

No. 647

GEORGE EARL TOOLSON,

Petitioner,

vs.

NEW YORK YANKEES, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court is reported at 101 Fed. Supp. 93. The opinion of the Court of Appeals for the Ninth Circuit is reported at 200 F. 2d 198.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 1952. The jurisdiction of this Court has been invoked by the petitioner under Title 28 U. S. C., Sections 1254(1) and 2101(c).

Statutes Involved.

The pertinent provisions of Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act are set forth in the Petition at pages 9 and 10.

Section 6 of the Clayton Act (15 U. S. C. Sec. 17) provides in part: "The labor of a human being is not a commodity or article of commerce. . . ."

Section 20 of the Clayton Act (29 U. S. C., Sec. 52) provides in part as follows:

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert . . . from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Subsections (a) and (c) of Section 13 of the Norris-LaGuardia Act (29 U. S. C., Sec. 113(a) and (c)) provide as follows:

> "(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of

employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section). * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

STATEMENT OF MATTER INVOLVED.

The Court of Appeals for the Ninth Circuit affirmed an order of the District Court which dismissed the action upon the separate and independent grounds (1) that the Court did not have jurisdiction over the subject matter of the action and (2) that, if the Court did have jurisdiction over the subject matter, the amended Complaint failed to state a claim upon which relief can be granted. [200 F. 2d 198; 101 Fed. Supp. 93; R. 47-49.]

The Case Allegedly Stated by the Complaint as Amended.

1. *The Complaint States Only One Alleged Claim Upon Three Theories.* The Complaint, as originally filed and as amended, purports to state only a single alleged claim for the recovery of treble damages under the anti-trust laws; and the three separate claims set forth in the Complaint serve only to state this alleged claim upon

three different theories as to the clauses or sections of the Sherman Act allegedly violated by the defendants.*

2. *The First Alleged Claim.* The gist of petitioner's first alleged claim is: The defendants entered into a contract which unreasonably restrained some unspecified line of interstate commerce in violation of Section 1 of the Sherman Act. (15 U. S. C. Sec. 1.) This contract provided (1) that all player contracts in the Major Leagues shall be in one form and all player contracts in the Minor Leagues shall be in one form and that each contract shall be assignable, shall grant the employing club or its assignee an option to renew and contain a covenant not to play for any club other than the employing club or its assignee, (2) that no club shall negotiate with a player under contract with, or on the reserve list of, another club without the latter club's express consent, (3) that a player who violates his contract or engages in certain other specified conduct, should be placed on the ineligible list, and (4) that a player on the ineligible list shall not play, be employed by a club in professional baseball or be released from his contract unless and until he shall have applied for, and shall have obtained, rein-

*Although named as defendants in the Complaint, the American League of Professional Baseball Clubs, National League of Professional Baseball Clubs, National Association of Professional Baseball Leagues, George N. Trautman and Binghampton Exhibition Company, Inc. were not served with process and are not parties to the action. [R. 3, 47.] In this brief the word "respondents" includes only those named defendants who were seryed and the word "defendants" includes all named defendants.

statement from the ineligible list to the active list. [R. 9-10, par. XI.] For brevity, the foregoing provisions of the alleged contract are hereinafter designated as the "player regulations."

While petitioner was under contract with the Newark International Baseball Club his contract was assigned to the Binghampton Exhibition Co., Inc., which was a named defendant not served with process. Petitioner refused to report to the assignee club. On May 25, 1950, petitioner for this breach of his player contract was placed on the ineligible list and was still on the ineligible list when the action was commenced. There is no allegation that plaintiff ever applied for, or was refused, reinstatement. Defendants have allegedly refused to allow petitioner to play professional baseball while on the ineligible list and have thereby damaged petitioner in the sum of $125,000. [R. 11, pars. XII, XIII.] From the foregoing, it is clear that petitioner's damages, if any, are alleged to have been caused solely by reason of the enforcement of the "player regulations" set forth in the alleged contract among the defendants with respect to their employment of baseball players.

3. The Second Alleged Claim. The second claim, as stated in the original Complaint, incorporated by reference the allegations of the first claim and alleged that the defendants had violated Section 1 of the Sherman Act by entering into a combination or conspiracy instead of a contract as alleged in the first claim.

Subsequently, the second claim was amended to allege that defendants had also entered into (1) a combination or conspiracy to prescribe the circumstances in which, and the conditions upon which, the circuits of Major and Minor Leagues may be changed and (2) a combination or conspiracy to define the territory in which, and the circumstances upon which, Major League Clubs could sell rights to broadcast or telecast descriptions of their games outside of their home city or territory and in the home city or territory of other clubs and to allege that each of said combinations or conspiracies violated Section 1 of the Sherman Act. [R. 36-38.]

Petitioner does not allege that he was, or is, engaged in giving professional baseball exhibitions or in the business of broadcasting or telecasting or that he was in any way damaged by either of the alleged combinations or conspiracies described in the preceding paragraph. Instead, petitioner predicates his alleged damages upon his having been placed upon the ineligible list under the player regulations as alleged in his first claim. [R. 12-13, par. III.]

4. *The Third Alleged Claim.* The third alleged claim, as amended, incorporates by reference the allegations of the first claim and alleges in substance the same facts that were alleged in the second claim, as amended; but alleges that such facts constitute a violation of Section 2 of the Sherman Act instead of violations of Section 1 of the Sherman Act, as alleged in the first and second

claims. Again, in the third claim, petitioner predicates his alleged damage solely upon his having been placed on the ineligible list under the player regulations and makes no allegations that he was damaged in any way by either of the alleged combinations or conspiracies respecting the territorial rights of leagues or the radio broadcasting and telecasting of descriptions of games. [R. 13, par. I, II-1; R. 18, par. III; R. 38-40.]

Respondents' Contentions Below.

In the District Court, defendants moved for an order dismissing the action upon the separate and cumulative grounds (1) that the Court is without jurisdiction over the subject matter and (2) that the Complaint as amended fails to state a claim upon which relief can be granted. [R. 25-26, 29-30.] In support of the foregoing motion, defendants contended:

1. That, as had been held by this Court in *Federal Baseball Club v. National League* (1922), 259 U. S. 200, (1) the giving of, and playing in, professional baseball games (a) are local intrastate, and not interstate, activities and (b) is a sport and not trade or commerce within the meaning of the Sherman Act; and (2) the player regulations, which are the only alleged restraints by which petitioner alleges that he had been damaged, do not relate to, or affect, any line of interstate commerce.

2. That, apart from the circumstances that professional baseball games are neither interstate activities nor trade or commerce, such player regulations do not (a)

restrain commercial competition, or (b) cause any injury to the public.

3. That, assuming *arguendo* that the giving of, and playing in, professional baseball games, constitutes interstate "trade and commerce" within the meaning of the Sherman Act, the Complaint as amended stated only a labor dispute which, as established by applicable decisions of this Court, is exempted from the operation of the anti-trust laws by applicable provisions of the Clayton and Norris-LaGuardia Acts.

Neither of the Courts below found it necessary to consider or decide the second and third contentions.

The Scope of Review Sought by Petitioner and the Reasons Assigned for Allowance of the Writ.

Although the Court of Appeals affirmed the order of the District Court dismissing the action upon two separate and independent grounds, stated above (*ante*, p. 3), petitioner seeks a review of only one of those grounds. (Pet. 12, Sec. III.) This presents *in limine* the question whether petitioner has a standing to invoke a review of one ground of a final order or judgment which is also based upon another independent ground.

In substance the reasons assigned by petitioner for allowance of the writ are:

1. The decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the Second Circuit in *Gardella v. Chandler* (1949), 172 F. 2d 402 (hereinafter called the "Gardella case").

2. The Court of Appeals "decided the question of the scope of the commerce Clause in a way probably in conflict with the applicable decisions of this Court."

3. The decision of the Court of Appeals is in conflict with an alleged belief of "the Congress of the United States" that "organized professional baseball is not beyond the Federal jurisdiction."

4. The question presented is of public importance because "Baseball is America's national pastime," there are pending in the lower federal courts "eight treble damage actions against various representatives of organized baseball seeking damages totaling several million dollars" and those in professional baseball state that "the great American pastime cannot continue should any of these actions be successful."

In the interests of brevity and clarity, we shall deal in inverse order with the first two reasons assigned by the petitioner. After answering the other reasons assigned by petitioner for allowance of the writ, we shall state briefly the other propositions which were presented to, but not considered by, the Courts below, each of which in our opinion would also require affirmance of the order dismissing the action and consequently a denial of the petition.

All emphasis throughout the argument is ours unless otherwise noted.

ARGUMENT.

I.

The Decision of the Court of Appeals Is Not in Conflict With the Applicable Decisions of This Court.

---

1. THE DECISION BELOW IS IN STRICT CONFORMITY WITH THE DECISION OF THIS COURT IN FEDERAL BASEBALL CLUB v. NATIONAL LEAGUE (1922), 259 U. S. 200.

The decision of the Court of Appeals strictly conforms, and any other decision would have been squarely in conflict, with the decision of this Court in *Federal Baseball Club v. National League* (1922), 259 U. S. 200 (hereinafter called the "*Federal Club* case") as clearly appears from the following analysis of the decisions. The decision of this Court in the *Federal Club* case affirmed a judgment of the Court of Appeals for the District of Columbia which reversed a judgment in favor of the plaintiff theretofore entered by the Supreme Court of the District of Columbia. (*National League v. Federal Baseball Club* (D. C. Cir. 1920), 269 Fed. 681.)

The *Federal Club* case was brought by a former member of the old Federal League against the National and American Leagues, their constituent clubs, their respective presidents and the old National Commission. (269 Fed. 682-683.) Plaintiff had sued for treble damages upon the ground that the defendants, by combining to restrict and monopolize the supply of Major League players in alleged violation of Sections 1 and 2 of the Sherman Act, had forced the plaintiff to cease operations with great loss. (269 Fed. 682.) Upon instructions that the defendants were engaged in interstate commerce, had attempted to

monopolize and had monopolized "a part of that commerce, principally through what is called the 'reserve clause' and ineligible features of certain agreements", the jury returned a large verdict for the plaintiff upon which the court entered judgment. (269 Fed. 684.)

In the *Federal Club* case, plaintiff contended that the "player regulations" which had been agreed upon and enforced by the defendants, constituted an unreasonable restraint of, or attempt to monopolize, interstate trade or commerce in violation of Sections 1 and 2 of the Sherman Act. The player regulations, to which the defendants had agreed, provided (1) that the players' contracts in both the Major and Minor Leagues shall be in one form, shall be assignable, shall contain a "reserve clause" or option in the employing club or its assignee to renew for the next season and shall contain a covenant not to play for any club other than the employing club or its assignee [269 Fed. 683, 687; R. 87, 91-92, 96, 103, 108, 110, 112-113];* (2) that no club should negotiate with a player under contract with, or on the reserve list of, another club without the latter club's express consent [269 Fed. 683; R. 87]; (3) that a player who violates his "reserve clause" or contract shall be disciplined by being placed on the ineligible list which shall be kept by the Leagues and circulated among their member clubs [269 Fed. 687; R. 90-91, 99]; and (4) that a player on the ineligible list shall not play, be employed by a club in the Major or Minor Leagues or be released from his contract unless and until he shall have applied for, and shall have

---

*In this analysis of the *Federal Club* case, citations reading "Record ....." refer to the Record in the *Federal Club* case which was filed and printed in this Court.

obtained, reinstatement. [269 Fed. 687; R. 91, 98-99.] Plainly, no distinction exists between the "player regulations" involved in the *Federal Club* case and those alleged in the case at bar.

In the *Federal Club* case, the plaintiff, to support its claim that the giving of, and playing in, professional baseball games constituted interstate trade or commerce or, in the alternative, that the player regulations unreasonably restrained some line of interstate trade or commerce, relied upon the following facts: (1) Players and umpires traveled, and the clubs transported baseball equipment, from State to State; (2) the clubs purchased baseballs from national manufacturers and the American and National Leagues respectively received large sums from such manufacturers for the right to advertise their products as the "official baseball" of those respective Leagues [269 Fed. 685; R. 265-269]; (3) the clubs played annual schedules of games and a World Series which required systematic and continuous travel from state to state in order to reach the places where such games were played (259 U. S. 208); and (4) the clubs of each Major League, for a substantial sum, sold to Western Union the right concurrently to transmit throughout the country play-by-play descriptions of games from each park in the Major Leagues. [269 Fed. 683; R. 262, 263.] Plainly, no distinction exists between the facts relied upon in the *Federal Club* case, to support a claim that professional baseball constitutes interstate commerce or that the player regulations restrain interstate commerce and those alleged in the instant case to support a like claim, unless it can be said that the effect of the sale of rights to transmit interstate descriptions of games depends upon the character of the medium or facility which the purchaser of such

rights utilizes for the transmission of such descriptions, that is, upon the fact that today some of the purchasers of such rights transmit some of such descriptions by radio and television instead of by the electric telegraph.

In reversing the judgment of the lower court in the *Federal Club* case, the Court of Appeals laid down the following propositions:

1. A game of baseball is inherently local from its beginning to its end. (269 Fed. 684-685.)
2. The travel of players and transportation of equipment in interestate commerce are not parts of the local game and do not convert that game into an interstate activity. (269 Fed. 684-685.)
3. Baseball games are a sport and not trade; and their inherent character as a sport is not changed when they are given for profit. (269 Fed. 685.)
4. The purpose and direct effect of the player regulations is to conserve the personnel of the clubs, to promote equality of competition and to maintain public interest in the games; and their effect, "if any," upon interstate commerce (*e. g.*, the travel of players and transportation of baseball equipment) was incidental and did not involve a violation of the Sherman Act. (269 Fed. 687-688.)

In holding that the giving of professional baseball exhibitions is a sport and not trade or commerce, within the meaning of the Sherman Act, the Court of Appeals said:

> ". . . If a game of baseball, before a concourse of people who pay for the privilege of witnessing it, is trade or commerce, then the college teams, who play football where an admission fee is charged, en-

gage in an act of trade or commerce. But the act is not trade or commerce; it is sport. The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade." (269 Fed. 685.)

In holding that the player regulations, which apply to the giving of the baseball exhibitions, did not restrain or monopolize the interstate activities or commerce in which the clubs and their personnel also engaged, the Court said:

"This brings us to consider whether or not the restrictions, which appellee says resulted in the monopolization denounced by the statute, affected illegally the interstate features of appellee's business, that is, the movement of its players and those of the other clubs of the Federal League and their paraphernalia from place to place in the league's circuit; for it is well settled that persons not engaged in interstate commerce may be guilty of violating the statute by illegally interfering with those who are so engaged . . . ." (269 Fed. 686.)

". . . The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be

obvious that the restrictions thus imposed *relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce.* Whatever effect, *if any,* they had, *was incidental, and therefore did not offend against the statute.*" (269 Fed. 687-688.)

In the unanimous opinion affirming the decision of the Court of Appeals, this Court, after stating that "the decision of the court of appeals went to the root of the case," said:

". . . Of course, the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled, and disciplined by the organizations, and this it is said, means commerce among the states. But we are of opinion that the court of appeals was right.

"The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the Leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. According to the distinction insisted upon in Hooper v. California, 155 U. S. 648, 655, . . . the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called *trade or commerce* in the commonly accepted use of these words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consummation is not commerce,

> does not become commerce among the states because the transportation that we have mentioned takes place. . . ."
>
> "If we are right, the plaintiff's business is to be described in the same way; and the restrictions by contract that prevented the plaintiff from getting players to break their bargains, and the other conduct charged against the defendants, were not an interference with commerce among the states."
>
> *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* (1922), 259 U. S. 200, 208-209.

Plainly, the decision below is in strict conformity with the decision of this Court which is upon all fours with the case at bar.

2. UNITED STATES v. SOUTHEASTERN UNDERWRITERS ASS'N. (1944), 322 U. S. 533, DID NOT, AS PETITIONER CONTENDS, OVERRULE ANY PRINCIPLE UNDERLYING THE DECISION IN THE FEDERAL CLUB CASE. (Pet. Br. 20-22.)

Petitioner contends that the *Federal Club* case relied heavily on the rationale and decisions in *Hooper v. California* (1895), 155 U. S. 648, and *Paul v. Virginia* (1868), 8 Wall. 168, and that the decision of this Court in *United States v. Southeastern Underwriters Ass'n.* (1944), 322 U. S. 533, overruled the rationale of those decisions. The *Federal Club* case did not cite *Paul v. Virginia*. Furthermore, the *Federal Club* case did not cite the *Hooper* case in support of its decision that the exhibition of professional baseball games is a sport and not trade or commerce and is purely local, but instead to support or illustrate the legal proposition that interstate

activities which are incidental to engaging in a purely local activity, do not convert the local activity into an interstate activity.

In the *Southeastern Underwriters* case, this Court did not overrule the principle for which the *Federal Club* case had cited the *Hooper* case, but held that this principle was not applicable to the insurance business. While the *Hooper* and other cases had held that the states had power to regulate and tax certain activities of foreign insurance companies, the *Southeastern Underwriters* case was the first instance in which the applicability of the federal anti-trust laws to the insurance business had been presented to this Court. (322 U. S. 533, 534.) On the other hand, the precise issue raised in the instant case was first presented to this Court in the *Federal Club* case and was decided squarely and unequivocally against petitioner's contention. There is an inherent distinction between an athletic sporting contest and the sale of insurance policies. Insurance is essential to all modern business. The playing of baseball games contains no element of either trade or commerce.

3. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE "RECENT DECISIONS" CITED BY PETITIONER. (Pet. Br. 22.)

As hereinbefore shown, the *Southeastern Underwriters* decision does not conflict with, but instead reinforces, the holding in the *Federal Club* case that professional baseball exhibitions are not interstate commerce.

North American Co. v. SEC (1946), 327 U. S. 686, lends no support to petitioner's contention. *First*, this Court sustained findings of the Commission that North American was engaged in interstate commerce through

the extensive businesses carried on by five direct subsidiaries which were admittedly engaged in interstate commerce. (327 U. S. 694-696.) *Second*, the case involved the Public Utility Holding Company Act which was expressly directed toward the prohibition or regulation of certain practices for the protection of interstate commerce. *Third*, this Court cited and distinguished the *Federal Club* case as illustrating a situation where the use of instrumentalities of interstate commerce has no more than a "casual and incidental relationship" to intrastate activities. (327 U. S. 694.)

In *Associated Press v. NLRB* (1937), 301 U. S. 103, this Court held that the commercial business of collecting news throughout the world and transmitting such news regularly and continuously over instrumentalities of interstate commerce throughout the several States constitutes interstate commerce. Moreover, the case involved the National Labor Relations Act which expressly regulates intrastate activities for the protection of interstate commerce. (*NLRB v. Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 31-32.)

In *Associated Press v. United States* (1945), 326 U. S. 1, this Court limited its consideration of the scope of the commerce clause to holding that "trade in news carried on among the states" is interstate commerce in support of which the Court cited *Associated Press v. NLRB* (1937), 301 U. S. 103. (326 U. S. 14.)

Thus the foregoing cases involve either the application of the Sherman Act to entirely different subject matter and factual situations or the application of statutes expressly directed to the regulation of specific practices (either intrastate or interstate) for the protection of in-

terstate commerce. None lays down any new principle with respect to the scope of the commerce clause which affects the decision in the *Federal Club* case.

4. THE FACT THAT DESCRIPTIONS OF SOME BASEBALL GAMES ARE NOW ALSO TRANSMITTED BY RADIO BROADCAST AND TELECAST INSTEAD OF ONLY BY TELEGRAPH DOES NOT RENDER THE FEDERAL CLUB CASE INAPPLICABLE TO THE CASE AT BAR.

Petitioner contends (Pet. Br. 22-23) that the *Federal Club* case is not applicable to the present-day situation because descriptions of games are transmitted by radio and television throughout the forty-eight states, because "baseball" receives substantial revenues therefrom and because such activities are within the scope of the commerce clause. Petitioner's complaint alleges that the defendants and other baseball parties have entered into agreements to restrict the right of clubs to authorize the broadcast and telecast of descriptions of their games. None of these allegations and contentions about radio and television render the *Federal Club* case inapplicable here.

1. The alleged restrictions on the sale of rights to broadcast and telecast descriptions of games are entirely irrelevant to this case and to the applicability of the *Federal Club* case. Petitioner was not engaged in broadcasting or telecasting descriptions of baseball games and, plainly, he was not injured or damaged by, nor is he alleged to have been damaged by or involved in, the broadcasting or telecasting of descriptions of games or any restraints thereon. Consequently, the issue raised by the complaint is not whether broadcasting and telecasting of baseball games are interstate commerce or whether the

authorization or the sale of rights for such broadcasting and telecasting has been illegally restricted.

The issue, we submit, is whether the activities in which the petitioner and the defendants were engaged, namely, the exhibition of baseball games, are interstate commerce, and whether the restrictions which allegedly injured the petitioner in the course of those activities, namely, the player regulations, illegally restrained interstate commerce. That precise issue was decided in the *Federal Club* case.

Petitioner, in support of a contention that baseball "affects interstate commerce" so as to be within the scope of the anti-trust statutes, cites *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219. (Pet. Br. 23.) That case applied the principle that a restraint of the type forbidden by the Sherman Act, although arising in the course of intrastate or local activities, violates the act if its effect upon interstate commerce is sufficiently substantial. Here, the player regulations, upon which petitioner solely predicates his alleged damages, do not, and are not alleged to, affect or restrict broadcasting or telecasting. Consequently, the *Mandeville* case is clearly inapplicable.

2. The advent of radio and television has not affected the basic character of the game of baseball as defined in the *Federal Club* case. It remains a local activity and a sport, not interstate trade or commerce. Manifestly, the sale by baseball clubs of rights to transmit interstate descriptions of games by radio or television cannot convert the admittedly local games into an interstate activity or into interstate commerce. It is the vendees (and not the vendor clubs) who, in broadcasting, telecasting or telegraphing such descriptions of local games, are engaged in

interstate commerce. (*Fisher's Blend Station v. Tax Commission* (1936), 297 U. S. 650, 654.)

At and long prior to the *Federal Club* decision, the clubs of the two Major Leagues, all of which were defendants in that case, had sold for substantial sums to Western Union Telegraph Company the right to transmit throughout the country, concurrently with the playing of the games, play-by-play descriptions of all Major League games. [*Federal Club* case R. 262-263.] This Court had long before held telegraphing to be interstate commerce. (*Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877), 96 U. S. 1.) This telegraphing of descriptions of games was urged by the Federal Club in its brief before this Court as a reason for holding that the defendant baseball clubs were engaged in interstate commerce. (Federal Club Br. 154.)

In *Kowalski v. Chandler, et al.*, decided February 20, 1953, by the Sixth Circuit Court of Appeals (not yet officially reported; 1953 CCH Trade Cases, par. 67,447), that Court, in passing upon the identical issue as to whether the sale by baseball clubs of broadcasting and telecasting rights made the *Federal Club* case inapplicable, stated:

> "The controlling authority is the decision of the United States Supreme Court in *Federal Baseball Club v. National League*, 259 U. S. 200, in which it was clearly held that organized baseball was not trade or commerce. The facts with respect to the sale of broadcasting rights for radio and television in this case, which are herein emphasized by appellant as distinguishing this case from that cited above, *are not different in any essential form from the sale of the rights of description of games over tele-*

graph wires in the Federal Baseball Club case, and there appears no reasonable basis for distinguishing that case from the one before us. . . ."

The fact that since the decision in the *Federal Club* case there are now different media for carrying the accounts of the games to the public cannot change those games from local affairs to interstate affairs. Otherwise, any local event that attracted the attention of the press or radio or television would become interstate.

There is an essential difference between the status of an interstate reporter and the thing reported. The Western Union Telegraph Company, the daily newspapers with interstate circulation, which includes all metropolitan newspapers, and the radio and television networks are each and all engaged in interstate commerce. Nevertheless, printed, oral or pictorial reporting of local events by those media cannot change the essentially local character of the events themselves.

Baseball games were carried on before the intervention of either radio or television precisely as they are carried on today, *and they would be carried on tomorrow exactly as they are today if for some cause radio or television ceased to exist.*

3. The decision of the Second Circuit Court of Appeals in *Gardella v. Chandler* (1949), 172 F. 2d 402, and the opinions expressed by Judges L. Hand and Frank therein overlooked the foregoing principles and establish no tenable basis for overruling the *Federal Club* decision.

In the *Gardella* case, the plaintiff, who had been placed on the ineligible list for breach of his player contract, brought suit for treble damages. The District Court, on the authority of the *Federal Club* case, dismissed the

action. The Court of Appeals for the Second Circuit, by vote of two judges to one, remanded the case for trial upon the issue of jurisdiction and, if the evidence should establish jurisdiction, upon the merits. Each of the three judges rendered separate opinions, no one of which agreed with the other. It is impossible, from reading these three opinions, to find a single rule of substantive law upon which any two judges agreed or any rule of law upon which any trial judge could base instructions to the jury.

Judge Chase in his dissenting opinion voted to affirm the dismissal of the complaint on the grounds, among others, that the *Gardella* case was not distinguishable from the *Federal Club* case. His opinion dealt specifically with the claim that the sale of radio and television broadcasting differentiated the *Gardella* case from the *Federal Club* case and said:

> ". . . Even the possible exception just mentioned exists only if the sale of these radio and television broadcast rights differs in some material way from the sale of the exclusive right to send 'play-by-play' descriptions of the games interstate over telegraph wires, for that feature was present in the previous case before the Supreme Court. In each instance by what is called the *sale of rights the appellees made it possible for others* to transmit information interstate. *The playing of baseball games then created the subject matter* concerning which information was sent by symbols carried by telegraph wires and translated into words just as such play now creates the subject matter concerning which information is sent through the air by impulses which are transformed either into words or pictures. So far as I can perceive, the difference in the method of transmission is without significance.

"These appellees do not themselves broadcast anything nor do they do anything more by way of production of what is broadcast than was shown to have been done in the former case to 'produce' what was described. Since the sellers of the rights to broadcast through the air do only what the sellers of the rights to send descriptions over telegraph wires did in the former case I can find no sound basis on the facts for distinguishing that case from this. It seems to me to have decided the precise question here presented and that it controls our decision."

Gardella v. Chandler (2d Cir., 1949), 172 F. 2d 402, 404.

Judge Frank's views were entirely opposed to those of Judge Chase. The reasonableness of the player regulations was not and could not have been an issue on the defendant's motion to dismiss the complaint. (*Board of Trade v. United States* (1918), 246 U. S. 231, 238.) Accordingly they had not been discussed either in oral argument or in the briefs. Nevertheless, Judge Frank based his opinion on an *ex parte* view that the player regulations were so unfair to the players as to require the court, if possible, to find some ground of reversal so that the wrongs which he conceived to be inflicted by those regulations could be remedied. With that premise Judge Frank concluded that the decisions of this Court in cases subsequently decided impliedly overruled the *Federal Club* case and left it an "impotent zombie."

Judge Hand did not agree with either Judge Frank or Judge Chase, although Judge Hand held that the *Federal Club* case had not been directly or impliedly overruled. Judge Hand held that the case should be remanded for trial with the burden on the plaintiff to show that the broadcasting and television activities of the defendants, together with any other interstate activities, mark their business as a whole. (172 F. 2d 407.)

We submit that Judge Hand's opinion contains three basic errors: (1) It ignored one of the grounds of the *Federal Club* case, namely, that baseball is not trade or commerce and confined itself solely to the question of the *quantum* of interstate activities; (2) it relied strongly upon the conception that the baseball clubs and those to whom they sold rights to broadcast and telecast descriptions of games were engaged in a common venture. Under this conception a contract of sale makes the vendor and vendee joint venturers; (3) it relied on a view that "the situation appears to me the same as that which would exist at a 'ball park' where a state line ran between the diamond and the grandstand," which situation he thought might impart an interstate character to the game. (172 F. 2d 402, 407.) This is squarely in conflict with the holdings of this Court in *Hopkins v. United States* (1898), 171 U. S. 578, 603, and *Anderson v. United States* (1898), 171 U. S. 604, 612-613. In both of those cases it was held that sales of cattle in the Kansas City Stockyards were local sales and did not become impressed with an interstate character because the Kansas-Missouri state line

ran through the stockyards, and cattle so bought or sold might be moved across that line.

In the *Gardella* case, as in this case, the alleged damages allegedly arose from enforcement of the player regulations by the defendant baseball clubs. The broadcasting and telecasting of games, or restrictions thereon, were not involved. The decision remanding the case for trial did not determine that the baseball clubs were engaged in interstate commerce, or that the player regulations affected interstate commerce, and did not constitute a holding by the Second Circuit Court of Appeals that the *Federal Club* case was not applicable. In a subsequent case, in which Judge Frank participated, Judge L. Hand stated that "the bare allegation in a complaint that the defendants make contracts with broadcast and television companies will not support the jurisdiction of the court." (*Martin v. National League Baseball Club* (2d Cir., 1949), 174 F. 2d 917, 918.)

Clearly, a baseball game is inherently local in character; the player regulations relate directly to the employment of players to perform in these local baseball exhibitions; and the player regulations are neither intended to, nor do, restrain any line of interstate commerce. Plainly, the decision in the *Federal Club* case rests upon sound principles; no subsequent factual change renders it inapplicable to the case at bar; and the sound principles upon which that case was decided remain wholly unimpaired under the subsequent decisions of this Court. It follows that there is no conflict between the decision of the Ninth Circuit in this case and the applicable decisions of this Court and that petitioner's contention that the decision below should be reviewed for that reason is without merit.

II.

The Decision of the Court of Appeals Below Is Not in Conflict With the Decision of Gardella v. Chandler (2d Cir., 1949), 172 F. 2d 402, Either Within the Meaning of, or Within the Principle Underlying, the Rules of This Court With Respect to Granting Certiorari.

As hereinbefore shown (*ante*, pp. 22-26) the decision in the *Gardella* case did not establish or lay down any substantial principle of substantive law or rule of procedure.

The purpose of, and the principle underlying Subsection 5(b) of Supreme Court Rule 38 is to secure uniformity in Federal law by resolving conflicts between circuits upon substantial principles of substantive law or rules of civil procedure which have not been authoritatively settled by this Court.

As hereinbefore shown, the decision in this case is in strict conformity with the decision of this Court in the *Federal Club* case. The principles of law involved have been authoritatively settled by this Court. To accomplish the purpose of the Rule it is wholly unnecessary to grant certiorari to review a decision in strict conformity with the applicable decision of this Court. A denial of the petition upon the authority of the *Federal Club* case will effectively remove any doubt with respect to the application of that case which may exist among any of the judges of the Court of Appeals for the Second Circuit. On the other hand, to grant certiorari to review a deci-

sion of another circuit, which is in strict conformity with the *Federal Club* case, would unnecessarily burden both this Court and the parties to that case. Consequently, we respectfully submit that any conflict which may exist between the decision of the Second Circuit in the *Gardella* case and the decision of the Ninth Circuit in the case at bar is not the type of conflict which requires or justifies the granting of certiorari within the principle underlying Subsection 5 of Rule 38 of this Court.

Contrary to the statement of petitioner, there is no confusion in the collective "judicial mind" of the lower federal judiciary. Neither the Ninth Circuit, the Sixth Circuit nor the District Courts have had, or are experiencing, any difficulty in applying the decision of this Court in the *Federal Club* case. If such confusion exists among any of the members of the Court of Appeals for the Second Circuit, that confusion will be completely and effectively dispelled by denial of the petition.

III.

Petitioner's Contention That the Decision of the Court of Appeals Is in Conflict With an Alleged Belief of the Congress of the United States Is Without Basis in Fact or Law and in Any Event Is Not a Ground for Granting Certiorari.

The third reason assigned for allowance of the writ is an assertion that the Congress believes that organized professional baseball is not beyond the federal jurisdiction. This assertion is based on a conclusion in a report of a Congressional Subcommittee that ". . . the Congress has jurisdiction to investigate and legislate on the subject of professional baseball." (Pet. 13.)

1. Obviously, a report of a Congressional Subcommittee is not an expression of belief or an act or conclusion of the Congress. Moreover, even if Congress had expressed or adopted a view on the subject that was in conflict with the *Federal Club* decision, that conflict would not be a ground for granting certiorari.

2. The Subcommittee's view quoted above is not in conflict with the *Federal Club* case. We may presume that the Congress can, if it so desires, regulate any interstate activities in which baseball clubs and their personnel engage and can also regulate their intrastate activities, if and to the extent that such regulation should be found necessary or appropriate to protect interstate commerce. (*Wickard v. Filburn* (1942), 317 U. S. 111; *NLRB v. Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 29-32.) However, the existence of that power does not convert baseball games into interstate commerce or bring the giving of professional baseball exhibitions within the scope of the anti-trust laws.

The Congress has enacted no legislation concerning baseball during the thirty years since the *Federal Club* decision. In the meantime, as the District Court pointed out in its opinion below:

> "Undoubtedly large investments have been made on the strength of Mr. Justice Holmes' opinion in the Federal Baseball Club case. . . ." (101 Fed. Supp. 95.)

The overruling of the *Federal Club* case decision at this late date would operate retroactively and inequitably. (*Walling v. Halliburton Oil Well Cementing Co.* (1947), 331 U. S. 17, 25-26; *Helvering v. Griffiths* (1943), 318 U. S. 371, 402; *United States v. Title Insurance & Trust Co.* (1924), 265 U. S. 472, 486, 487.)

The observations of this Court in *Walling v. Halliburton Oil Well Cementing Co.* are most appropriate on this point. The majority of this Court, speaking through the Chief Justice, after holding that a prior decision in the so-called *Belo* case was correct, said:

> ". . . Moreover, our holding in Belo has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. *Knowing of the Belo decision, the Congress has permitted §7(a) to stand unmodified and the courts have applied it as so construed.* Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. *Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time.*"
>
> *Walling v. Halliburton Oil Well Cementing Co.* (1947), 331 U. S. 17, 25, 26.

IV.

Contrary to Petitioner's Assertion, This Case Presents No Question of Public Importance Which Has Not Been, but Should Be, Settled by This Court.

Petitioner assigns as a reason for granting certiorari the importance of the question presented in this case to the American people because Baseball is America's national pastime and because its existence is threatened by numerous treble damage actions. (Pet. 13, 14.)

The public importance of a question sought to be presented on certiorari is relevant under the Rules of this Court only where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rules 38-5(b). Manifestly, that ground does not exist in this case because the important question of federal law involved herein has already been decided by this Court in the *Federal Club* case.

Any currently pending litigation involving the status under the anti-trust laws of the player regulations, including the "reserve clause," would be disposed of by denying the petition in this case upon the authority of the *Federal Club* decision.

V.

The Complaint Does Not State a Claim Under the Anti-trust Statutes, Even If It Were Held or Assumed That the Defendants Are Engaged in Interstate Commerce.

---

(1) The Player Regulations, the Only Alleged Restraints Which Allegedly Injure the Petitioner, Do Not Restrain Commercial Competition. Agreements Between Employers as to the Terms and Conditions of Employment of Employees Are Not Contrary to the Common Law or to the Federal Anti-trust Laws.

The refusal of the defendants to employ petitioner embraced no semblance of commercial competition. Even if it could be held—contrary to reason and the decided cases—that giving exhibitions of baseball constitutes commercial competition between the various clubs and leagues, the non-employment of petitioner did not affect that competition.

As stated by this Court in the *Apex Hosiery* case:

> "A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint *upon commercial competition* in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product *but in which it was not shown*

that the restrictions on shipments had operated to restrain commercial competition in some substantial way. . . ."

Apex Hosiery Co. v. Leader (1940), 310 U. S. 469, 495-497.

The courts have consistently recognized the distinction between competition for labor and commercial competition. (*Schatte v. International Alliance, et al.* (9th Cir. 1950), 182 F. 2d 158, 167, *cert. den.* (1950), 340 U. S. 827; *Conference of Studio Unions, etc. v. Loew's, Inc.* (9th Cir. 1951), 193 F. 2d 51, *cert. den.* (1952), 342 U. S. 919; *Levering & Garrigues Co. v. Morrin* (1933), 289 U. S. 103; *United Brick & Clay Workers v. Robinson Clay Product Co.* (N. D. Ohio 1946), 64 Fed. Supp. 872, 874.)

In *United States v. Gold* (2nd Cir., 1940), 115 F. 2d 267, 268, the Court distinguished between (1) the service of the employees to the dressing and dyeing companies and (2) the service of the dressing and dyeing companies to the manufacturers of fur garments. Defendant's acts affected only the former. Therefore, it was held that defendant had restrained only competition for labor and had not violated the Sherman Act. Concerning restraints on competition for labor, the Court, speaking through Judge Learned Hand, declared:

". . . There can be no question that the accused intended to acquire a monopoly of the whole supply of the services rendered by the employees; . . . *But the court in the Apex Case expressly declared that that Sherman Act did not cover any restraint of competition in such services . . .*" (115 F. 2d 238.)

What the petitioner is really complaining about here is the adoption by the baseball clubs—as an association of

employers—of rules and regulations for the employment of baseball players by the members of that association. Such agreements by employers regulating competition for employment services are clearly within the principle applied to unions in the *Apex Hosiery* case. This principle has been frequently applied in the federal and state courts. (*United States v. Gold, supra,* (2d Cir. 1940), 115 F. 2d 236, 238; *Hunt v. Riverside Club* (1905), 140 Mich. 538, 104 N. W. 40 (association of plumbers fixed wages of labor); *State v. Employers of Labor* (1918), 102 Neb. 768, 169 N. W. 717 (association of all employers in Omaha combined to force open shop); *Trade Press Pub. Co. v. Moore* (1923), 180 Wis. 449, 193 N. W. 507 (all Milwaukee newspaper publishers agreed to force open shop); *American Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies' Garment Mfrs. Ass'n* (1931), 143 Misc. Rep. 319, 255 N. Y. Supp. 614 (employers' association to create and enforce labor standards); *Associated Hat Mfrs. v. Baird-Unteidt Co.* (1914), 88 Conn. 332, 91 Atl. 373 (holding manufacturers' association which forced open shop did not violate Sherman Act or common law); *Androff v. Building Trades Employers' Ass'n.* (1925), 83 Ind. App. 294, 148 N. E. 203 (association limiting employees' pay); *Williams v. Quill* (1938), 277 N. Y. 1, 12 N. E. 2d 547 (transit employers agreed to force closed shop); *Atkins v. W. & A. Fletcher Co.* (1903), 65 N. J. Eq. 658, 55 Atl. 1074 (association intimidating and excluding certain workers); *City Trust, etc., Co. v. Waldhauer* (1905), 47 Misc. Rep. 7, 13, 95 N. Y. Supp. 222, 225; *Forstmann & Huffman Co. v. United Front C. of T. Workers* (1926), 99 N. J. Eq. 230, 237, 133 Atl. 202, 204, 205; *Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220* (C. C. Nev. 1908), 159 Fed.

500, 517, 518 (members of association combined to reduce wages); *Beck v. Railway Teamsters' Protective Union* (1898), 118 Mich. 497, 517, 77 N. W. 13, 21.)

While some of the foregoing cases were decided under the common law and some under state anti-trust statutes embodying the common law principle, all support the proposition; for it has long been settled that the Sherman Act prohibits only those restraints or monopolies which were unenforceable or illegal at common law. (*Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 498; *Standard Oil Co. v. United States* (1911), 221 U. S. 1, 58.)

(2) The Player Regulations Do Not Directly or at All Affect Interstate Commerce.

The only interstate activities in which baseball clubs engage are the incidental travel of players from state to state and the transportation of baseball equipment. There is not and could truthfully be no allegation that the ineligibility of the petitioner reduced the number of players employed by any club or the number of players who travel from state to state, or the quantity of baseball equipment which is transported in intra or interstate commerce. It is not alleged, and it could not truthfully be averred that the ineligibility of the petitioner or the player regulations generally affect in any way the radio broadcasting and televising of baseball games. Obviously, if petitioner is unable to play, some other person will play and travel in his place, and his presence or absence in any game would not affect the radio broadcast or television of it. Of course, it is well established that in order to furnish a basis for a civil action, any restraint of interstate trade or commerce must be a sub-

stantial and direct restraint. (*Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219, 234; *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U. S. 344, 410-411, 412; *United Leather Workers' International Union v. Herbert & Meisel Trunk Co.* (1924), 265 U. S. 457; *Levering & Garrigues Co. v. Morrin* (1933), 289 U. S. 103; *Board of Trade v. United States* (1918), 246 U. S. 231, 238; *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469.)

(3) The Player Regulations Do Not Cause Any Injury to the Public.

The private statutory right of action to recover treble damages caused by a violation of the Sherman Act was created to induce private persons to aid in the enforcement of that Act. However, the private right of action is incidental and subordinate to the protection of the public. (*Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, 239; *Apex Hosiery Co. v. Leader, supra* (1940), 310 U. S. 469, 500; *Appalachian Coals, Inc. v. United States* (1933), 288 U. S. 344, 360; *Feddersen Motors v. Ward* (10th Cir., 1950), 180 F. 2d 519, 521-522; *Glenn Coal Co. v. Dickinson Fuel Co.* (4th Cir., 1934), 72 F. 2d 885, 889; *Abouaf v. J. D. & A. B. Spreckels Co.* (N. D. Cal., 1939), 26 Fed. Supp. 830, 832-833; *Myers v. Shell Oil Co.* (S. D. Cal., 1951), 96 Fed. Supp. 670, 674; *Citizen Publishing Co. v. Merchants & Mfr. Ass'n* (D. D. C., 1949), 83 Fed. Supp. 994, 997.)

In *Shotkin v. General Electric Co., supra,* the principle is thus stated:

> ". . . Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. *There must be*

harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert . . . ."

Shotkin v. General Electric Co. (1948), 171 F. 2d 236, 239.

It is not alleged and cannot be inferred that the player regulations have caused any decrease in the quantity or deterioration in the quality of professional baseball exhibitions available to the public or any increase in the price charged to the public for admissions to such exhibitions.

(4) THE COMPLAINT ALLEGES A LABOR DISPUTE WHICH IS SPECIFICALLY EXEMPTED FROM THE ANTI-TRUST LAWS BY PROVISIONS OF THE CLAYTON AND NORRIS-LAGUARDIA ACTS.

Petitioner's grievance is that the defendants by concerted action have refused to employ him in professional baseball. Such a refusal by employers, whether singly or in concert, to employ any party to a labor dispute is specifically declared both by the Clayton and the Norris-LaGuardia Acts (29 U. S. C. Sec. 52; 29 U. S. C. Secs. 101-115) not to be considered or held to be in violation of any law of the United States.

The allegations of the complaint which allege facts claimed to damage petitioner reveal nothing more than a controversy between the employee and his employer (and persons associated with the employer) concerning terms and conditions of employment. Petitioner alleges that he was under contract to the Newark International Baseball Club; that the contract was assigned to the Binghamton Club in accordance with the express provisions of his contract; that petitioner refused to report

to the assignee club; that for such failure he was placed on the ineligible list; that under an agreement among the baseball clubs, the clubs have agreed not to tender contracts to ineligible players until they are reinstated to the eligible list, and that pursuant to that agreement, the defendants have refused and still refuse to allow him to play professional baseball [R. 9-11, 13].

Section 20 of the Clayton Act (29 U. S. C., Sec. 52) provides in part as follows:

> "And no such restraining order or injunction shall prohibit *any* person or persons, *whether singly or in concert* . . . from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

Plainly, the dispute between petitioner and defendants comes within the precise terms of the statute quoted above.

Aside from this specific exemption granted by Section 20 of the Clayton Act to the exact conduct charged to the defendants in this case, Section 6 of the Clayton Act and the Norris-LaGuardia Act also exempt from the Sherman Act this dispute arising out of the employer-employee relationship.

It is declared in Section 6 of the Clayton Act, 15 U. S. C., Section 17:

> "The labor of a human being is not a commodity or article of commerce. . . ."

In the *Apex Hosiery Co.* case this Court said:

> ". . . Since the enactment of the declaration in §6 of the Clayton Act, 15 USCA §17 that 'the

labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*"

Apex Hosiery Co. v. Leader (1940), 310 U. S. 469, 502-503.

That this principle laid down in the *Apex* case is equally applicable to agreements of employers and employers' associations and to disputes between employers and an employee is clear from the language both of Section 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

In the report to the Senate on the Norris-LaGuardia Act, it was said:

"Moreover, it will be observed that this section (Section 6), as do most all of the other prohibitive sections of the bill, *applies both to organizations of labor and organizations of capital.* The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."

Sen. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932).

Petitioner's claim is clearly within the definition of Subsections (a) and (c) of Section 13 of the Norris-LaGuardia Act (29 U. S. C., Sec. 113(a) and (c)). Subsection (c) reads:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment,

> or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

This Court has held that the Sherman Act, Section 20 of the Clayton Act and the Norris-LaGuardia Act are three interlacing statutes which are to be read together. (*United States v. Hutcheson* (1941), 312 U. S. 219, 231-232.)

Directly in point and fully sustaining our contentions are the decisions of the District Courts of California and Ohio in *United States v. San Francisco Electrical Contractors Ass'n* (N. D. Cal., 1944), 57 Fed. Supp. 57, 60, 63; *United Brick & Clay Workers of America v. Robinson Clay Products Co.* (N. D. Ohio, 1946), 64 Fed. Supp. 872, 874.

Conclusion.

We submit that for each and all of the foregoing reasons the petition should be denied.

Respectfully submitted,

NORMAN S. STERRY,
Attorney for Respondents.

HENRY F. PRINCE,
FREDERIC H. STURDY,
GIBSON, DUNN & CRUTCHER,
Of Counsel.